FOR ARGUMENT

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No. 79-116

In the Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

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1. The District of Columbia Workmen's Compensation Act specifically applies to an injury to an eligible employee "irrespective of the place where the injury or death occurs." 36 D.C. Code § 501 (1973). Accordingly, the pre-1972 limitation of Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to injuries that are not otherwise covered by state law is no more applicable to the District of Columbia Act than is the other limitation of Section 3(a)—that the injuries have occurred on the navigable waters of the United States. Respondent Washington Gas Light Company asserts (Br. 19) that the decision to this effect in *Travelers Insurance Co.* v. *Cardillo*, 141 F. 2d 362 (D.C. Cir. 1944), is "wrong" and argues that Section 3(a) bars an action under the District of Columbia Act for

petitioner's injury (Br. 17-21). But the holding in *Travelers Insurance Co.* is the only sensible way to construe the statute and respondent points to no decision rejecting that holding, although countless awards have been made under the District of Columbia Act for injuries that were cognizable under the workers' compensation statutes of other states. Cf. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947) (District of Columbia award upheld in circumstances where Virginia statute was applicable). Indeed, respondent itself conceded this point before the administrative law judge, acknowledging that, but for the alleged preclusive effect of the Virginia award, petitioner's claim was covered by the District of Columbia Workmen's Compensation Act (Pet. App. 4a, 39a).

2. Respondent also contends (Br. 13-16) that petitioner's claim was barred by the one-year statute of limitations under the Act. However, the Benefits Review Board correctly held (Pet. App. 6a-7a) that the statute of limitations was tolled under 33 U.S.C. 930(f) because respondent did not file a report of the injury with the Department of Labor, as required under 33 U.S.C. 930(a). The purpose of the tolling provision, as respondent notes (Br. 15), is to prevent the disallowance of claims whose untimeliness may be traceable to the employer's failure to file the required injury report, thus eliminating a possible incentive for employers to withhold such reports. Congress was concerned that the lateness of the claim was due in some cases to ignorance on the part of the employee that would have been remedied had the administrative procedures under the Act been set in motion by the filing of an injury report. H.R. Rep. No. 1945, 75th Cong., 3d Sess. 9 (1938). That very purpose is implicated here. Respondent cannot seek the protection of

the statute of limitations when it failed to file the required report, particularly when it advances no justification for that failure.[1]

3. Respondent errs in its assertion (Br. 23) that the question in this case is whether the workers' compensation award made to petitioner is an "exception to the [full faith and credit] rule on judgments." The Full Faith and Credit Clause does not require that the District of Columbia give a greater preclusive effect to a Virginia award than does Virginia. Accordingly, the relevant inquiry, as the Court explained in *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), is whether the Virginia award has the effect, under Virginia law, of precluding an award under the workers' compensation statute of another state. Contrary to respondent's contention (Br. 28), that inquiry is not inconsistent with the Full Faith and Credit Clause. Rather, it is a prerequisite to implementation of the Clause to determine the extent of the preclusive effect of the Virginia award that must be honored in another state.

McCartin establishes a rule of construction for determining whether a workers' compensation award in one state has the effect of barring an award under the workers' compensation statute of another state. As

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[1]In addition, the statute of limitations had not run under Section 913(a) because "payment of compensation" was made for the injury. The courts have not agreed on whether payments in another state are included under this Section. Compare *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F. 2d 265 (7th Cir. 1930), with *Windrem* v. *Bethlehem Steel Corp.*, 293 F. Supp. 1 (D.N.J. 1968). As cases under state statutes have recognized, however, the policy embodied in the statute of limitations is not advanced by barring claims after the employer has recognized the existence of a compensable disability by making compensation payments (as opposed to medical payments) in any state. See *Ryder* v. *Insurance Co.*, 282 So. 2d 771, 774-775 (La. Ct. App. 1973). See also *Martin* v. *L. & A. Contracting Co.*, 162 So. 2d 870, 872-873 (Miss. 1964).

discussed in our opening brief (pages 22-30), there are strong policy reasons in favor of permitting supplemental awards. If such awards are prohibited, the interest of the second state is given no effect and the employee is denied benefits to which he would have been entitled had he been fully aware of his rights, despite the well-settled policy of construing workers' compensation statutes liberally in furtherance of their purpose to compensate injured employees. See *Industrial Commission* v. *McCartin*, *supra*, 330 U.S. at 628. These policy considerations warrant the continuing application of *McCartin* so that workers' compensation awards will not be barred by prior awards in another state unless the first state, by its use of "unmistakable language" (330 U.S. at 628), clearly intends its award to have such a preclusive effect. Thus, we do not disagree with respondent (Br. 44) that a state may not refuse to give full faith and credit to a sister state's judgment simply because of its own policy considerations. The question here, however, is whether, under *McCartin*, the Virginia award is intended to bar a supplemental District of Columbia award such that the District of Columbia must give it that preclusive effect.

In addition to the policy reasons supporting *McCartin*'s strict construction of state statutes in favor of permitting successive awards, we noted in our opening brief (pages 26-28) that several commentators have gone further to urge that the Full Faith and Credit Clause should not bar a supplemental workers' compensation award in a second state even if the first state clearly indicates that its award is intended to have such an effect. This theory rests on the peculiar nature of workers' compensation awards as limited administrative remedies created by statutes that

generally are not enforced by other states.[2] The argument advanced by these commentators lends added weight to the rule of construction established in *McCartin* in favor of supplemental awards, but the Court is not faced in this case with the fundamental question of whether a state can ever bar a supplemental award, because the Virginia statute manifests no intention to preclude other states' awards. Hence, this case is controlled by *McCartin*.

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Solicitor General

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[2]The theory does not depend, as respondent suggests (Br. 44), upon a constitutional requirement that the forum state apply an "interest analysis." In any tort suit involving choice of law, the choice of law determination is made by a court in the forum state. In each such case, of course, the law of some state will not be applied, but a choice is made. In the workers' compensation area, by contrast, a choice of law determination is not made because states generally will not adjudicate claims arising under the workers' compensation statute of another state. It is at least open to question whether a state has the power to bar the assertion in another state of a claim that the first state would not have adjudicated itself under any circumstances. See *Semler* v. *Psychiatric Institute*, 575 F. 2d 922, 929-930 n.41 (D.C. Cir. 1978).